

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SHAUN B.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2011090741

**DECISION**

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on October 27, 2011, in Bakersfield, California.

Jeffrey F. Popkin, Associate Director, represented Kern Regional Center (Regional Center or Service Agency).

Claimant represented himself with the assistance of Aseneth Casanova.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

**ISSUE**

Whether Regional Center should continue to fund the counseling therapy services provided by Gary Creott, L.C.S.W. (Creott).

**FACTUAL FINDINGS**

1. Claimant is a 24-year-old, non-conserved Service Agency consumer with a diagnosis of Mental Retardation. He also has diagnoses of Psychotic Disorder NOS, Mood Disorder NOS, and Impulse Control Disorder NOS.

2. Claimant resides in a group home and receives independent living support. In the past, he has resided at his own home, but his behavior toward his mother required outside placement. Claimant has a twin brother, and their relationship is not always amicable, as they have engaged in aggressive behavior toward each other. Claimant attends a day program, Kern Adult Program (KAP), where he receives vocational training and some support to improve his behavior.

3. Claimant's most recent Individual Program Plan (IPP) contains objectives to receive necessary care to maintain his health and wellness and to continue to attend KAP. In support of the former objective, the IPP states that private insurance or Medi-Cal are to fund Claimant's medical expenses. However, it also states that "[Service Agency] to seek back-up funding per [Regional Center] policies, for any medical expenses including transportation, to out-of-county medical expenses related to Shaun's developmental disability, which is not funded by private insurance/Medi-Cal, according to current purchase standards." (Exhibit 9, at p. 2.) In the KAP objective, Service Agency expects that Claimant will receive assistance in reducing incidents of tantrums, verbal threats of harm, and elopement.

4. Claimant is easily provoked to anger and to verbal and physical aggression. He has regularly engaged in aggressive behavior toward others. Claimant has been hospitalized on numerous occasions due to his behaviors. On May 31, 2011, Claimant required crisis intervention due to a series of incidents and threats that caused concern that he would harm himself or others.

5. a. On July 27, 2011, following the latest crisis intervention, Michael Musacco, Ph.D. (Musacco), conducted a court-ordered mental retardation and dangerousness evaluation pursuant to Welfare and Institutions Code<sup>1</sup> section 6500. Dr. Musacco conducted a clinical interview, reviewed pertinent records, and conducted psychological testing of intelligence and achievement.

b. In his interview with Dr. Musacco, Claimant reported disputes with his mother, which would often result in incidents that required the police to come to the home. Claimant stated that he is not close to his mother, and acknowledged that he recently threatened to kill her. In Dr. Musacco's opinion, Claimant has limited insight into the chronic nature of his emotional and behavioral problems, which revolve around his problematic relationship with his mother. Claimant's developmental disability aggravated his ability to understand his relationship with his mother or cope with the difficulties resulting from these problems.

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<sup>1</sup> All further references are to the Welfare and Institutions Code.

c. Dr. Musacco concluded: "It is my opinion that the client suffers from Mental Retardation and he represents a risk of harm to himself and others as a result of his Mental Retardation. The symptoms of the client's Mental Retardation include impaired judgment, deficits in his impulse control, and deficits in his coping skills. These symptoms interfere with the client's ability to inhibit his dangerous behaviors, leading me to recommend that he would benefit from placement in a Community Care facility as defined under the provisions of *Welfare and Institutions Code* § 6500." (Exhibit 7, at p. 6.)

6. Claimant sees a psychiatrist on a regular basis for medication therapy, which services appear to be funded by Medi-Cal. In addition, Service Agency has been funding counseling services with Creott since 2008. In a June 28, 2011, report Creott wrote: "Shaun has the essential features of episodes of failure to resist impulses when his anxiety increases resulting in the potential for serious assaultive acts of property destruction. Shaun has a tendency to allow a variety of issues to bother him and upset him where he later acts out towards others around him or his mother when the stimulant was somewhere else. It is important to note that Shaun is still considered a danger to himself and others. Primary deficits in his functioning are associated with his explosive and/or aggressive behavior disorder and the impairment in his intellectual and adaptive functioning. His condition substantially contributes to his inability to control his dangerous behavior and poses a danger to himself and others." (Exhibit 6, at p. 1.) Creott recommended continued weekly individual and group counseling for anger management and aggressive impulse control.

7. Claimant is satisfied with the services he receives from Creott, and would like to continue receiving them.

8. Service Agency Purchase of Services Counseling Services Policy permits funding for time-limited counseling services, if necessary to relieve barriers to the consumer's continued development or his ability to remain in the least restrictive environment, and if no other funding source is available. Moreover, it provides that "Any continuing authorization after the evaluation and [initial five] sessions will not exceed three (3) months of a time in duration and will be based on written progress reports that justify additional therapy. Continuation must be based on progress being demonstrated toward achieving IPP objectives. Sessions will be provided at 1 hour per week. . . ." (Exhibit 11.)

9. On August 30, 2011, Service Agency issued a notice of proposed action denying continued funding for the services provided by Creott, effective October 3, 2011, and referring Claimant to a new counselor for assessment of current needs. Service Agency cited section 4646.4 as the authority for its proposed action, and set forth the following reason for denial of funding: "The cost of providing services or supports of comparable quality by different providers, if available, shall be reviewed, and the least costly available provider of comparable service, including the cost of transportation, who is able to accomplish all or part of the consumer's individual program plan, consistent with the particular needs of the consumer as

identified in the IPP, shall be selected.” (Exhibit 4) Claimant filed a fair hearing request on or about September 21, 2011

10. A new therapist, Diane Martinez, L.C.S.W. (Martinez), has been providing counseling services for an undetermined period. No reports from Martinez were presented at the hearing.

## LEGAL CONCLUSIONS

1. In enacting the Lanterman Developmental Disabilities Services Act (Lanterman Act), section 4500 et seq., the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.) “Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age. Consumers of services and supports, and where appropriate, their parents, legal guardian, or conservator, should be empowered to make choices in all life areas. These include promoting opportunities for individuals with developmental disabilities to be integrated into the mainstream of life in their home communities, including supported living and other appropriate community living arrangements. . . .” (*Id.*)

2. The Lanterman Act gives regional centers, such as Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (§ 4620 et seq.) Thus, regional centers are responsible for developing and implementing individual program plans, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.) Regional centers are also required to provide advocacy for, and protection of, the civil, legal, and service rights of consumers. (§ 4648, subd. (b).)

3. Section 4512, subdivision (b), defines “services and supports for persons with developmental disabilities” as “[s]pecialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. . . .” The services and supports can include mental health services and counseling for the consumer and his family. (*Id.*) Moreover, “[T]he determination shall be made on the basis of the needs and preferences of the consumer, or where appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. . . .” (*Ibid.*)

4. In *Williams v. Macomber* (1990) 226 Cal.App.3d 225, 232-233, the court rejected a regional center's refusal to fund day care services, which funding had been denied because it was prohibited by the regional center's policy. The court concluded that the Lanterman Act requires funding decisions to focus on individual needs and on services and supports designed to meet specific needs. Thus, while Service Agency's purchase of service policy may generally guide its funding actions, a decision in any specific case must be based on each individual consumer's particular needs, even if an exception must be made to the policy.

5. In this instance, for approximately four years, the parties have agreed, through the IPP process, that Claimant requires counseling services and supports to meet his developmental needs. No evidence was presented at the hearing to indicate that his needs have changed or that he no longer benefits from counseling services. On the contrary, the expert opinions of Dr. Musacco and Creott make clear that Claimant continues to require counseling and that his needs are related to his developmental disability.

6. The provision of law on which Service Agency relies for its action, section 4646.4, requires regional centers to regularly review the availability of other funding sources, including private insurance, Medi-Cal, and other generic resources. Moreover, even before recent legislative changes due to budgetary challenges, the Lanterman Act contained the following prohibition: "Regional center funds shall not be used to supplant the budget of any agency which has legal responsibility to serve all members of the general public and is receiving funds for providing those services." (§ 4648, subd. (a)(8).)

7. At the hearing, Service Agency argued that generic providers of mental health services should be responsible for funding Claimant's counseling services. Claimant apparently qualifies for Medi-Cal, as indicated by the funding for his psychiatrist. However, no persuasive evidence was presented at the hearing that Claimant qualifies for additional mental health services that would include counseling or that such services are actually available. Nor does it appear that Service Agency has advocated on Claimant's behalf for any such generic services.

8. Given Claimant's established and continuing need for counseling services, and the present absence of a clear generic alternative, Service Agency funding for counseling services shall continue. However, despite Claimant's preference for Creott, his continued need for therapy after approximately four years with the same therapist is sufficient cause for Service Agency to examine the effectiveness of counseling services through the fresh eyes of a new provider. Martinez may continue to provide the services and submit clinical data and recommendations for Service Agency and Claimant and his advocates to assess the cost-effectiveness of the services.

## ORDER

Claimant's appeal is sustained in part, and Regional Center shall continue to fund counseling services consistent with this Decision.

Dated: November 4, 2011

Samuel D. Reyes  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.